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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 208.

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner*,

v.

STANLEY T. McCREADY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

CHARLES COOK HOWELL,
V. E. PHELPS,
Wilmington, N. C.

HUGH L. WILLCOX,
Florence, S. C.
Attorneys for Petitioner,
Atlantic Coast Line Railroad Company.

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ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner,*

v.

STANLEY T. MCCREADY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Atlantic Coast Line Railroad Company, respectfully asks this court to review on writ of *certiorari,* as authorized by United States Code, Title 28, Section 344 (b), a judgment of the Supreme Court of the State of South Carolina in the case of Stanley T. McCready vs. Atlantic Coast Line Railroad Company, rendered on the 31st day of May, 1948, as shown by a true copy of the opinion of the court therein, (R. 129), which affirmed a judgment for respondent, plaintiff herein, for $1,056.00. Under the practice prevailing in South Carolina, no final judgment, separate from the opinion of the Supreme Court, is rendered, and the opinion is the final judgment of the court. (See Clerk's certificate (R. 137)).

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was originally brought in the Civil Court of Florence, South Carolina, by respondent herein, plaintiff below, under the Carmack Amendment to the Interstate Commerce Act as amended, United States Code, Title 49, Section 20(11), (R. 115, 130) to recover for the alleged loss from decay in transit of a carload shipment of green beans shipped on June 2, 1944, by respondent from Lake City, S. C., consigned to H. B. Wright and Sons at Preston, Maryland, (R. 4, 7-8; bill of lading, plaintiff's Exhibit 1 following R. 124, introduced in evidence R. 9).

Respondent's complaint alleged two specific grounds of negligence (R. 6), to-wit, negligent delay in transit which was charged out of the case by the trial judge (R. 107, folio 428), and is not involved herein, and negligence "in failing to maintain in said refrigerator car *sufficient ice to prevent the deterioration* of said perishable commodity, in failing to reice said refrigerator car *at reasonable intervals* while in transit, and in allowing said shipment of beans to become heated. (Italic ours.) The complaint asked damages in the sum of $1,056.00 account of the alleged acts of negligence by defendant, this petitioner. Petitioner's answer (R. 6-9) denied the material allegations of the complaint, including the allegations of negligence, and, as an affirmative defense, (R. 7-8) pleaded that on or before the date of shipment there was in effect Interstate Commerce Commission Service Order No. 210 (Def's. Ex. "B", following R. 124, introduced R. 73). The answer further expressly pleaded in defense Rules No. 130 and No. 135 of Perishable Protective Tariff No. 12, (certified copy introduced R. 73; defendant's Exhibit "B" following R. 124), which said interstate tariff rules No. 130 and No. 135 read as follows:

RULE NO. 130

Condition of Perishable Goods Not Guaranteed by Carriers

Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, *but merely to retard such deterioration or decay insofar as may be accomplished* by reasonable protective service, *of the kind and extent requested by the shipper*, performed without negligence. (Italics ours.)

RULE NO. 135

Liability of Carriers

Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. *The duty of the carriers is to furnish without negligence* reasonable protective service *of the kind and extent so directed or elected by the shipper and carriers are not liable* for any loss or damage that may occur because of the acts of the shipper *or because the directions of the shipper were incomplete, inadequate or ill-conceived.* (Italics ours.)

Petitioner (defendant below) also offered in evidence (R. 73) the companion Rules No. 80 and Nos. 201 and 215 of interstate Perishable Protective Tariff No. 12,. (petitioner's exhibit marked "Def's. Ex. B", following R. 124). Rule No. 80 provides that "on carload shipments, shippers must declare in writing on shipping order and/or bill of lading, at loading station, the protective service desired as authorized in this tariff." Rule No. 201 provides that except as otherwise provided in this section shipper must declare in writing on shipping order and/or bill of lading at loading station the service desired as authorized in this section, "using one of the shipping instructions shown below", and under the heading "(A) Fresh Fruits, Vege-

tables, Berries or Melons", one of the designated services (1) (B) is "Standard refrigeration service." The bill of lading issued at Lake City, S. C., covering this shipment (plaintiff's Ex. 1, following R. 124) shows that the refrigeration service requested by the shipper at the loading station was "standard refrigeration." Petitioner's witness Preston, who was a member of the Perishable Freight Committee which issued the rules contained in Perishable Protective Tariff No. 12, testified (R. 67, 69) as an expert witness as to the meaning of the refrigeration service designated as "standard refrigeration", and testified (R. 69) that standard refrigeration consisted of the initial icing of a refrigerator car in the bunkers and "reicing at regular icing stations between the loading point and the final destination." He further testified that the location of the *regular* icing stations between Lake City, S. C., point of origin, and Preston, Md., the final destination, were, first at Florence, S. C., and second, Norfolk, Va. This testimony was wholly uncontradicted. Petitioner's witness Austin (R. 49-52) testified that the Fruit Growers Express Company performed the icing and refrigeration service for petitioner (R. 49) and the the car in suit, MDT 3671, was, according to the records made by the witness who actually supervised the icing, initially iced (before loading) with 8100 pounds of ice at 6 p. m. June 1, 1944, this being three-fourths of the capacity of the car which had a capacity of 10,800 pounds, but the icing was restricted to three-fourths capacity by the Interstate Commerce Commission's Service Order No. 210, supra; that the car was reiced after it was loaded on June 2, 1944, and such reicing was completed at 8:20 p. m. on June 2 with 6300 pounds of ice which brought the bunkers up to 8100 pounds again, three-fourths of its capacity, and that when it was reiced on June 2 at Florence, S. C., it contained only 1800 pounds of ice. This witness actually supervised and measured the icing from the top of the cars. He made his records immediately upon checking and measuring the ice in the cars (R. 55), and fur-

ther testified that it was a matter of opinion and "depends on the temperature" (R. 53) whether ice put in a car not previously iced would melt faster than ice put in a previously iced car, but he thought it would melt faster in a car not previously iced. Florence, S. C., was the first *regular* icing station at which the shipment could have been iced under the definition "standard refrigeration" as given without contradiction by petitioner's witness Preston, supra. The second and last regular icing station from point of origin to destination was Norfolk, Va., and petitioner's witness Morgan (R. 58, 59) testified that as agent for the Fruit Growers Express Company, the icing agent of the carrier, whose duties were the icing and inspection of refrigerator cars (R. 58), he completed the icing of the car in suit at 9:54 p. m. June 4, 1944, and at that time put 5800 pounds of ice in the bunkers, which would indicate that 2300 pounds of ice remained in the bunkers at the time he reiced the car at Norfolk, Va., (R. 59), and which brought the ice up to 8100 pounds.

Respondent testified without contradiction that the beans were in good condition when loaded at destination (R. 11), and the consignee testified (R. 26) that the shipment was refused at destination and the shipment was later dumped on the authority of the agent of the destination carrier (R. 29). However, the *only* testimony offered by respondent to prove that the carriers did not ice the shipment at the two regular icing stations at Florence, S. C., and Norfolk, Va., in accordance with the designation on the bill of lading and under the tariffs heretofore set out on Pages 2 and 3 hereof, or to prove negligence in performing such icing, was the testimony of respondent's witness Wright, who testified (R. 26) that when the car doors were opened at destination "we opened the (ice) bunkers, *they were empty of ice,* there was no ice in there at all", and the beans had become dark and were beginnning to be soft and moldy and heat was coming out of the car. There was no other testimony whatever offered to contradict petitioner's undisputed testimony

heretofore set out that the car was fully iced up to the legal limit of three-fourths capacity at the two regular icing stations en route, and none to controvert petitioner's testimony as to the extent of its duty to ice under the directions given in the bill of lading and the applicable Perishable Protective Tariff provisions, Rules Nos. 130, 135, 80 and 201.

At the close of all the evidence (R. 104), petitioner moved for a directed verdict for defendant on the grounds that the only reasonable inference from the testimony was that "standard refrigeration" was supplied by the carriers to the shipment of beans in accordance with the shipper's request, and with the Perishable Protective Tariff rules applicable, and that petitioner had fully performed its transportation contract as to icing and had adequately furnished the protective service requested by plaintiff (who was the shipper), and, further that there was no testimony that defendant failed to exercise ordinary care in the preservation of the shipment of beans in transit. The trial judge (R. 106) overruled petitioner's motion, stating there was substantial evidence of negligence in not furnishing sufficient refrigeration under the bill of lading, such alleged evidence being that the consignee testified that when the car door was opened steam or smoke came out of the car "and the bunkers were empty." At the same time (and we think contrary to his action on motion for non-suit), the trial judge charged that compliance with the shipper's instructions as to protective measures to be taken was the "complete protection to the carrier against liability for loss." (R. 116). In due course, petitioner appealed to the South Carolina Supreme Court and assigned as error substantially the same grounds urged in support of its motion for directed verdict at trial, namely that the only reasonable inference from the testimony was that "standard refrigeration" was furnished by the carriers in accordance with plaintiff's request and in accordance with the rules, regulations and tariffs of the Interstate Commerce Commission.

(See Exceptions 1, 2 and 3, R. 122-123). The State Supreme Court held in its opinion and decision (R. 131) that the burden was upon respondent to prove the negligent refrigeration alleged, but further held, as did the trial court, as hereinbefore pointed out, that respondent could, notwithstanding petitioner's undisputed evidence as to proper reicing at the two regular icing stations, and notwithstanding the restrictions on liability imposed by the interstate Perishable Protective Tariff, Rules No. 130 and No. 135, prove such negligence by "circumstantial evidence", and that respondent's testimony that the bunkers were empty at destination and the beans spoiled and worthless constituted such circumstantial evidence of negligence in failing to give the standard refrigeration contracted for, as to take the case to the jury. On this question the State Supreme Court said: "Inference drawn from physical facts, *such as the empty bunkers,* may be as strong as direct evidence. Such inferences amount to circumstantial evidence and circumstantial evidence, when sufficiently strong, is as competent as positive evidence to prove a fact." (R. 133). The court then continued that the evidence showed the beans were decayed and deteriorated at destination so as to be worthless, and the "ventilators of the car were closed and *the ice bunkers contained no ice.* We think the respondent sustained the burden of proof;" adding that "the jury in the present case was authorized to find from the evidence that the appellant was guilty of negligence *in failing to give the standard refrigeration contracted for.*" In reaching this conclusion, the opinion states that the court assumed "that appellant showed by *uncontradicted evidence* that this refrigeration car was reiced to three-fourths of its capacity at Florence and Norfolk." (Italics ours).

Petitioner's earnest contention is that, in view of its uncontradicted testimony as to the refrigeration service requested by the shipper and the refrigeration actually furnished by petitioner at the two regular icing stations en route, and in view of the restrictions and limitations on the

carriers' liability imposed by the provisions of the interstate tariff, Rules No. 130 and No. 135, supra, the court below clearly erred in holding that the fact that the ice bunkers were empty of ice at destination and the beans in a heated and worthless condition, constituted any substantial evidence of negligence in failing to perform, without negligence, its duty to give the refrigeration requested under the tariffs, and hence, it was the duty of the State Supreme Court to reverse the judgment for respondent as not being supported by any substantial evidence. The duty of the carrier, and the extent of such duty, is fully set out in the recent and authoritative decision of the 5th Circuit Court of Appeals in the case of *Atlantic Coast Line Railroad Company* v. *Georgia Packing Company*, 164 F. 2d 1, (Nov. 1947) and the several decisions cited therein.

II.

STATEMENT OF BASIS OF THIS COURT'S JURISDICTION.

Petitioner contends this court has jurisdiction to review the judgment of the Supreme Court of South Carolina herein for the following reasons:

This action was brought to recover for alleged loss and damage to an interstate shipment of freight (R. 4 and 6-9), and was necessarily brought under the Carmack Amendment to the Interstate Commerce Act as amended, United States Code, Title 49, Section 20(11), and the State courts held that is was so brought. (R. 115, 130). The action was for alleged negligence in the refrigeration of a perishable shipment, and in its answer petitioner alleged and specially set up as its principal defense certain provisions of an interstate tariff, namely Perishable Protective Tariff No. 12, Rules No. 130 and No. 135 (R. 8-9), and alleged that it furnished, without negligence, protective service as requested in the interstate bill of lading and required by said tariff provisions (which have the effect of a federal statute,

Pennsylvania RR. Co. v. *International Coal Mining Co.*, 230 U. S. 184, 197). As disclosed by petitioner's Summary Statement of the matters involved herein, petitioner proved by undisputed evidence that it rendered the protective service required by the shipper's request on the bill of lading, and contended below, both in its motion for directed verdict (R. 104) and in its exceptions in the State Supreme Court (R. 122-123), that a verdict should be directed for petitioner because the evidence showed that petitioner had fully complied with its transportation contract as to furnishing "standard refrigeration" without negligence. Cases which petitioner believes fully sustain the jurisdiction of this court to review the judgment of the Supreme Court of South Carolina herein on this petition for writ of *certiorari* are:

StL. Iron Mountain & Sou. Rwy. Co. v. *Starbird*, 243 U.S. 592, 595 to 602;

Cleveland, C. C. & St. L. R. Co. v. *Dettlebach*, 239 U.S. 588, 591 to 593;

Southern Pac. Co. v. *Stewart*, 245 U. S. 359, 361-362;

StL. I. M. & S. R. Co. v. *McWhirter*, 229 U. S. 265, 275-277, and

Atlantic Coast Line Railroad Co. v. *Geargia Packing Co.*, 164 F. 2d 1, 3 (5th C. C. A., 1947). Rehearing denied, 165 Fed. 2d, 169.

III.

THE QUESTIONS INVOLVED.

1. Whether, in view of petitioner's undisputed testimony of the performance of carriers' refrigeration obligation as directed in the bill of lading and defined in Perishable Protective Tariff Rules Nos. 130 and 135, the State Supreme Court did not err in holding that there was sufficient circumstantial evidence to make an issue of fact for the jury on the question of petitioner's alleged negligence in failing to give the "standard refrigeration" requested by shipper.

2. Whether the court below did not err in holding that the facts that the ice bunkers were empty at destination and the beans spoiled and smoking, was some substantial circumstantial evidence that petitioner was negligent in failing to render the standard refrigeration service contracted for in the bill of lading.

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The reasons relied on by petitioner for allowance of the writ of certiorari as prayed for herein are:

(1) The South Carolina Supreme Court has decided a federal question of substance herein which has not heretofore been determined by this court, namely, that notwithstanding the fact that the carrier proves by uncontradicted evidence that it discharged its full obligation under Perishable Protective Tariff Rules No. 130 and 135 by furnishing the protective refrigeration service requested by the shipper, the carrier may still be held liable if plaintiff's evidence shows that the ice bunkers were empty at destination and the perishable commodity deteriorated and spoiled. (See Note 1, page 11).

(2) The State Supreme Court's decision clearly violates the said rules of the interstate tariff in holding that evidence that ice bunkers were empty at destination was evidence that the carrier did not perform its said tariff obligations in giving the refrigeration service requested by the shipper, because the said Rules Nos. 130 and 135 only obligate the carrier to furnish without negligence, *protective service of the kind and extent directed by the shipper,* while the necessary effect of the State Court's holding is to obligate the carrier to supply sufficient ice to last and refrigerate to destination, irrespective of the request made by the shipper on the bill of lading.

(3) In reaching this decision, the State Supreme Court overlooked or ignored well settled rules of evidence of this and other federal and state courts with respect to the sufficiency of circumstantial evidence, offered by a party on whom rests the burden of proof, to disprove a material fact established by undisputed evidence of the party. See *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, 338-341; also, incidentally, *Chicago, M&StP. R. Co.* v. *Coogan*, 271 U. S. 472, 474. (The kind or amount of evidence to establish a federal question not controllable by state courts).

WHEREFORE, for all of the foregoing reasons, your petitioner prays that a writ of certiorari be issued to the Supreme Court of South Carolina, to the end that said cause may be reviewed and determined by this court, as provided by law, and that upon such review the said judgment of the Supreme Court of South Carolina be ordered reversed and judgment directed for petitioner.

CHARLES COOK HOWELL,
V. E. PHELPS,
Wilmington, N. C.

HUGH L. WILLCOX,
Florence, S. C.
Attorneys for Petitioner,
Atlantic Coast Line Railroad Company.

Note No. 1. As indicating the importance of this decision to carriers of perishable commodities, see Appendix to Petitioner's Brief showing by certificate of the Interstate Commerce Commission that in the year 1947 this petitioner alone transported 66,284 cars of perishable commodities subject to refrigeration. Liability could be imposed in a suit on any of these shipments on the same ground on which liability was imposed by the State Courts herein.

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v.

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BRIEF FOR PETITIONER.

OFFICIAL REPORT.

The decision of the Supreme Court of South Carolina herein has not yet been officially reported.

It is found on Page 129 of the record and is also reported in 48 S. E. 2d p. 193, Advance Sheets, July 15, 1948.

CONCISE STATEMENT OF GROUNDS OF JURISDICTION.

The date of the judgment sought to be reviewed herein is May 31, 1948 (R. 129).

The action was brought in the State Court to recover for alleged loss and damage to an interstate shipment of freight (R. 4, 6-9), and was necessarily brought under, and was tried under, the Carmack Amendment to the Interstate Commerce Act, United States Code, Title 49, Section 20 (11) (R. 115, 130). Petitioner, defendant below, pleaded

and set up as its principal defense Perishable Protective Tariff No. 12, Rules No. 130 and No. 135 (R. 8-9). (See Pages 2 and 3 of petition under petitioner's Summary Statement of the Matter involved). Petitioner contended at the trial and on appeal to the State Supreme Court (R. 104; R. 122-123, Exceptions 1, 2 and 3) that it had proved by undisputed evidence that it fully complied with these tariff rules and that judgment should be directed for it, but its motion for directed verdict was overruled, and judgment entered for plaintiff, which was affirmed by the State Supreme Court in its decision and final judgment on appeal (R. 129).

The State Court's decision necessarily decided the federal questions involved adversely to petitioner, and petitioner cites as sustaining the jurisdiction of this court to review the State Court's judgment all of the cases listed on Page 9 of the petition in its "Statement of Basis of this court's jurisdiction."

STATEMENT OF CASE.

All of the material evidence and facts in the record are fully set out, beginnning on Page 1 of the petition, under the heading "Summary Statement of the Matter involved", and are also fully stated as may be necessary in the course of our argument in this brief; repetition here will, therefore, be unnecessary.

SPECIFICATION OF ASSIGNED ERRORS URGED.

1. The State Supreme Court erred in holding that there was sufficient circumstantial evidence to make an issue of fact for the jury on the question of petitioner's alleged negligence in failing to render the refrigeration service requested by the shipper, in view of the provisions of Perishable Protective Tariff Rules Nos. 130 and 135.

2. The State Supreme Court erred in holding that the facts that the ice bunkers were empty at destination and the beans spoiled, or any other facts in the record, consti-

tute circumstantial evidence to show that petitioner was negligent in failing to render the standard refrigeration service contracted for by the shipper.

3. The State Supreme Court's holding failed to give effect to relevant and applicable interstate tariffs, Rules No. 130 and No. 135 of Perishable Protective Tariff No. 12, supra.

SUMMARY OF ARGUMENT.

Petitioner contends that the judgment for respondent herein for loss and damage to an interstate shipment of perishable freight should be reversed and the suit dismissed, because petitioner's admittedly undisputed evidence on the single issue involved shows that it performed without negligence all of its refrigeration obligations imposed by the interstate tariff, Perishable Protective Tariff Rules Nos. 130 and 135, by initially icing the car at point of origin and reicing it at every regular icing station en route, as directed on the bill of lading. The burden of proving negligent failure to perform petitioner's refrigeration obligations under the tariff was upon respondent, and the State Supreme Court so held (R. 131), and petitioner contends that the fact that the bunkers of the car were empty of ice when opened at destination cannot, as a mater of law, be demed any circumstantial evidence that petitioner did not furnish the refrigeration required and specified by Rules Nos. 130 and 135 and directed on the bill of lading; since to so hold, as did the State Supreme Court, would ignore and violate the limitations placed on the carrier's refrigeration obligations by the aforesaid tariff rules, and in effect make the carrier an insurer that the ice supplied would last and refrigerate through to destination, irrespective of the kind and extent of refrigeration service directed by the shipper under the said tariff Rules No. 130 and No. 135, and Rule No. 80.

Further, petitioner contends that the court below, in reaching this conclusion on the basis of alleged circumstan-

tial evidence, overlooked or ignored well settled rules of this and other courts hereafter referred to as to proof by circumstantial evidence by a party having the burden of proof, of a material fact which has been proved by undisputed direct evidence by the other party.

POINT I.

Under the undisputed evidence herein and the applicable interstate tariff rules, petitioner fully performed its refrigeration obligations and the State Supreme Court erred in holding that there was circumstantial evidence of negligence in failing to perform its obligations, and in affirming a judgment against petitioner for that reason.

This question is raised by petitioner's Exceptions 1, 2. and 3 (R. 122-123).

The first question for determination is the extent of the obligation of the carrier to ice and refrigerate perishable shipments under the applicable provisions of the Perishable Protective Tariff, Rules No. 130 and No. 135 and, for the court's convenience, we will again here set out these rules (R. 73, Def's. Exhibit "B" following R. 124).

RULE NO. 130

CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS

Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, *but merely to retard deterioration or decay insofar as may be accomplished* by reasonable protective service, *of the kind and extent requested by the shipper,* performed without negligence. (Italics ours.)

RULE NO. 135

LIABILITY OF CARRIERS

Property accepted for shipment under the terms and conditions of this tariff will be received and trans-

ported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. *The duty of the carriers is to furnish without negligence* reasonable protective service *of the kind and extent so directed or elected by the shipper and carriers are not liable* for any loss or damage that may occur because of the acts of the shipper *or because the directions of the shipper were incomplete, inadequate or ill-conceived.* (Italics ours.)

It will be observed, first, that the carriers "do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay", but the only undertaking assumed is to retard such deterioration "insofar as may be accomplished by reasonable protective service, *of the kind and extent requested by the shipper* performed without negligence." Rule No. 135 provides that the property will be transported "subject to such directions, *only*", and such election by the shipper as to the character and extent of the protective service provided for in the tariff. The rule then states the duties of the carriers in furnishing such service, and explicitly states that the "duty of the carriers is to furnish without negligence reasonable protective service *of the kind and extent so directed or elected by the shipper*", and then provides that carriers are not liable for loss or damage occurring because of the acts of the shipper or because his directions were incomplete or inadequate. We submit it is perfectly clear that the sole duty of the carriers under these tariffs was to furnish refrigeration service of the kind and to the extent directed by the shipper and to furnish it without negligence, and it is further clear that if the carrier does furnish the kind of protective service requested by the shipper and there is no substantial evidence of negligence in the manner in which it is furnished, there cannot possibly be any liability on the carrier for failure to perform its refrigeration obligations. Other rules of this protective tariff offered in evidence by petitioner (R. 73) namely, Rules No. 80 and No. 201, require

the shipper to state on the bill of lading the refrigeration service he desires (Def's. Exhibit "B" following R. 124), and the bill of lading, plaintiff's Exhibit I, shows that the shipper requested "standard refrigeration."

These protective tariff Rules Nos. 130 and 135 were originally prescribed by the Interstate Commerce Commission in 1920 and, as indicating the views of the Commission as to the extent of the obligations thereby imposed on the carriers, petitioner calls attention to its decision and opinion In the Matter of Perishable Freight Investigation, 56 I. C. C. 449, et seq. On Page 483 of its opinion will be found the identical rules here involved, and on Page 482 of its opinion, the Commission says:

> "If the shipper should undertake, as he would under Section 4 of the proposed tariff, to control the amount of ice to be used initially or for reicing, *it is difficult to believe that a carrier, following the instructions given by the shipper, could be held responsible for harm resulting from inadequacy of the ice supplied.*" (Italics ours).

While the Commission's holding is, we assume, not absolutely binding on this court, it should be highly persuasive as to the extent of the obligations assumed by the carrier and the protection given carriers by the rules, as coming from the official body which promulgated them. As heretofore pointed out, an interstate tariff has the same binding effect as a federal statute. *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 197.

A recent federal decision which is directly in point as to the refrigeration obligations assumed by the carrier under the above tariff rules, and which clearly supports the construction given by the Interstate Commerce Commission above, is *Atlantic Coast Line Railroad Company* v. *Georgia Packing Company, et al.*, 164 F. 2d 1; rehearing denied in 165 F. 2d 169. (5th C. C. A. December 1947). This was an action for alleged negligent loss to a refrigerated shipment of fresh meat shipped in interstate commerce, in which the

defendant carrier set up in defense compliance with Perishable Protective Tariff Rules No. 130 and No. 135, identical with the rules relied on in the instant case. The evidence showed delivery to carrier in good condition and that the product was spoiled when delivered at destination. The sole issues were negligent delay and failure to reice the car so as to preserve the fresh beef. The opinion of the court, after setting out the foregoing tariff rules, said:

> "It is apparent that these rules limit the liability of a carrier transporting perishable goods to liability for negligent failure reasonably to carry out instructions given by the shipper."

The court further held that where the shipper alleged specific acts of negligence, such as failure to properly reice, the burden of proving such acts was upon the shipper. (This is also held by the State Supreme Court in the instant case (R. 131), but we submit that it did not enforce or impose such burden.) The opinion of the 5th C. C. A. further said:

> "Under the protective tariffs applicable in this case the shipper must show that there was a lack of ordinary care on the part of the carrier, *but proof by the carrier of compliance with the shipper's instructions is a complete defense to an allegation of negligence in connection with the protective service.* Sutton v. Minneapolis & St. L. Ry. Co., 222 Minn. 233, 23 N. W. 2d 561; Southern Pacific Co. v. Itule, 51 Ariz. 25, 74 P. 2d 38, 115 A. L. R. 1274. Plaintiff did not in any degree sustain its burden of proving the specific acts of negligence charged, while defendant-appellant incontrovertibly showed more than full compliance with plaintiff's instructions." (Italics ours).

It will be noted from the italicized language above that the court held that proof of compliance with the shipper's instructions was a complete defense to an allegation of negligence in connection with the protective service.

The identical holding was made by the Supreme Court of Minnesota in the case of *Sutton* v. *M. & St. L. Ry. Co.* 23 N. W. 2d 561; 222 Minn. 233 (1946). In that case, the suit was to recover for the loss of a carload of eggs shipped in interstate commerce, and the plaintiff contended that the icing was inadequate, and plaintiff even had some testimony that the bunkers contained no salt at a certain point in transit, as directed by the shipper's instructions on the bill of lading. Perishable Protective Tariff Rule No. 135 of Tariff No. 12 was likewise involved in that case. On Page 562 (23 N. W. Rep. 2d), the court said:

> "The liability of a common carrier to the shipper of perishable products is based upon failure to exercise ordinary care in the preservation of such products while in course of transportation. George B. Higgins & Co. v. Chicago, B. & O. R. Co., 135 Minn. 402, 161 N. W. 145, L. R. A. 1917C, 507; McNeill & Scott Co. v. Great N. R. Co., 156 Minn. 120, 194 N. W. 614; Howe v. Great N. R. Co., 176 Minn. 46, 222 N. W. 290. *This rule is elaborated by the one that, if the shipper gives instructions as to the protective measures that shall be taken to preserve such products, compliance with such instructions is complete protection to the carrier against liability for loss.* Southern Pacific Co. v. Itule, 51 Ariz. 25, 74 P. 2d 38, 115 A. L. R. 1268. *No case to the contrary has been called to our attention. The rule is fundamentally just.* Rule No. 135 of Perishable Protective Tariff No. 12, on file with and approved by the interstate commerce commission, is to the same effect. To make out a case against defendant, it must appear that the eggs were delivered to the original carrier in good condition and that their arrival at Minneapolis in bad condition was due to lack of ordinary care on the part of the carrier, *having in mind the rule that compliance with the shipper's instructions as to protective service is a complete defense against a charge of negligence in connection with such service.*" (Italics ours).

Another federal case on the construction and meaning of Tariff Rules No. 130 and No. 135 which were also involved in that case, is *Standard Hotel Supply Co.* v. *Pennsylvania*

R. R. Co., 65 F. Supp. 439. On Page 443 of the opinion, the court said:

> *"Under Rule 130 the carrier is required to furnish only the reasonable protective service of the kind and extent requested by the shipper, and not any additional service allegedly based upon a custom prevailing at the place of shipment."* (Italics ours).

We also quote the following pertinent language from Pages 441-442:

> "Under the (Interstate Commerce) Act the responsibility assumed by the carrier is fixed by the agreement made and contained in the bill of lading, in accordance with published tariffs and regulations. Southern R. v. Prescott, 240 U. S. 632, 637, 638, 36 S. Ct. 469, 60 L. Ed. 836; Chesapeake & Ohio R. v. Martin, 283 U. S. 209, 221, 51 S. Ct. 453, 75 L. Ed. 983; Georgia, Florida & Alabama R. v. Blish Co., 241 U. S. 190, 197, 36 S. Ct. 541, 60 L. Ed. 948."

On Page 442, the court also made this pertinent observation:

> "Each shipper is supposed to know the condition of his own commodity and the requisite amount and period of pre-icing, if any, that the commodity requires."

Since the shipper directs the kind and extent of the protective service or icing he desires, it is also apparent that the shipper is supposed to know the amount and times of icing in transit necessary and, as we have heretofore seen from the decisions, the only obligation of the carrier is to furnish icing of the kind and to the extent specified by the shipper. If the shipper should specify that the shipment was only to be iced at point of origin and one icing station in transit, and the carrier did this without negligence, obviously the carrier would not be liable in damages if the commodity were spoiled in transit because the shipment was not iced often enough. We may here point out to the court that the respondent in drafting his complaint and

alleging negligence in failing to furnish sufficient ice, had no accurate idea at all of the carrier's legal obligation to ice under the tariffs because (R. 6) the complaint charged negligence "in failing to maintain in said refrigerator car *sufficient ice to prevent the deterioration* of said perishable commodity [and] in failing to reice said refrigerator car *at reasonable intervals while in transit*, and in allowing said shipment of beans to become heated." (Italics ours). Under Rules No. 130 and No. 135 of the tariffs, supra, as construed by all of the foregoing decisions, it was obviously not the duty of the carrier to maintain "sufficient ice to prevent the deterioration" of the shipment, or to reice the car "at reasonable intervals while in transit", but only to give without negligence refrigeration of the kind and extent requested by the shipper, which was admittedly done in this case. However, the State Supreme Court apparently followed the theory of respondent's complaint in holding in effect that the carrier must reice often enough so that there would be ice in the car at destination, since it distinctly held that evidence that there was no ice in the car at destination and the beans wer spoiled, was circumstantial evidence of negligence.

If, as all of the authorities hold and the tariff rules themselves plainly state, the carrier is only obligated to furnish the kind and amount of refrigeration requested by the shipper, which in this case was to initially ice at origin and reice to the extent permitted by I. C. C. Service Order No. 210 at the regular icing stations at Florence, S. C., and Norfolk, Va. (R. 69), the State Court's holding that empty bunkers at destination was evidence of negligence necessarily imposed additional obligations not imposed by the tariff rules namely, the obligation to furnish sufficient ice to keep the bunkers full or partly full until the car reached destination. The State Supreme Court's decision, therefore, was in violation of the tariff rules. Further discussion, we think, cannot make the matter clearer. The fact that the bunkers were empty of ice at destination, therefore,

cannot be considered as any evidence whatever of petitioner's negligence in furnishing the refrigeration requested. This eliminates the supposed "circumstantial" evidence relied on by the State Supreme Court to affirm the judgment against petitioner and requires the reversal of its judgment.

While its opinion shows that the State Supreme Court relied on, as supposed circumstantial evidence of negligence, the fact that the bunkers were empty at destination, it also indulged in some speculation as to how much ice the bunkers should have contained at destination, based on the amount of ice remaining in the car when reiced at Florence, S. C., and Norfolk, Va., and concluded that it would be "reasonable to infer that if the car received 8100 pounds, its three-fourths capacity at Norfolk, then at least 2300 pounds should have been found therein at destination" (R. 132, fol. 134); the Court's reason for this inference being that "there is no evidence showing any marked variation in summertime temperature" during the period of shipment. It is true, as the court implied, that a marked variation between the temperature at Florence, S. C., and at Norfolk, Va., and thence to destination, would affect the rapidity of the ice meltage, but we point out that if the variation of temperature were material on the question of petitioner's negligence, the burden of proving such variation would be on respondent, since the court held (and properly so) that respondent had the burden of proving negligence, and the State Supreme Court could not *assume*, as it did, that there were no marked variations of temperature in transit from South Carolina to Maryland, or no other unusual circumstances affecting refrigeration. There is no evidence at all in the record as to temperature at any point. The courts hold that when vicissitudes of climate or seasons are material, they must be proved like other facts. *Sou. U. Co.* v. *Murdock*, 99 Fla. 1086, 128 So. 430. However, these incidental speculations by the State Supreme Court in its opinion are coupled with its basic holding that the fact that

the bunkers contained no ice at destination was circumstantial evidence of petitioner's negligence in furnishing the refrigeration requested, and we have seen that this ground of alleged negligence must be eliminated as contrary to the interstate tariffs, Rules No. 130 and 135, and all of the decisions construing them.

POINT II.

The judgment below must also be reversed because it is based on alleged circumstantial evidence of negligence, when petitioner's positive and direct evidence given by unimpeached witnesses shows without contradiction that the car was given the refrigeration required by the tariffs and the law, so that the negligence sought to be inferred from the circumstances did not exist.

There is another aspect of this case which involves well established rules as to the sufficiency of circumstantial evidence to prove a material fact, which will necessitate the reversal of the State Supreme Court's judgment for plaintiff herein because not supported by any evidence. The State Supreme Court's decision and judgment was based solely on the proposition that there was sufficient circumstantial evidence to make an issue of fact on the question of whether petitioner negligently failed to give the refrigeration service requested by the shipper. The State Supreme Court's opinion (R. 132, last par. of fol. 133) shows that in reaching its conclusion that there was sufficient evidence to submit the case to the jury, it assumed "that appellant showed by uncontradicted evidence that this refrigerator car was reiced to three-fourths of its capacity at Florence and Norfolk." The undisputed evidence indicates that this assumption of the State Court is correct. The uncontradicted testimony of petitioner's witness Austin (R. 50-51) shows that he initially iced the car at Florence, S. C., to full three-fourths capacity on June 1, and reiced it there on June 2 also to full three-fourths capacity, there being

only 1800 pounds of ice in the car before reicing. Petitioner's witness Morgan also testified without contradiction (R. 158-9) that he reiced the car at Norfolk, Va., at 9:54 p.m. June 4 to full three-fourths capacity. These were the only regular icing stations between origin and destination (R. 69). This testimony, therefore, shows without contradiction or dispute that the refrigeration service requested on the bill of lading pursuant to the tariffs was given by the carrier. The refrigeration service requested was "standard refrigeration" (Plaintiff's Exhibit I following R. 124; introduced in evidence R. 9). Standard refrigeration consists of the initial icing of the car and reicing at regular icing stations between point of origin and destination, which in this case were Florence, S. C., and Norfolk, Va., (R. 69). Petitioner proved without contradiction or impeachment, therefore, its full performance of the refrigeration service contracted for. It is well settled, of course, that neither court nor jury can disregard testimony because the witnesses are employees of one of the parties. *C. & O. Ry.* v. *Martin*, 283 U. S. 209, 216-220; *Pennsylvania RR. Co.* v. *Chamberlain*, 288 U. S. 333, 343.

The question is, therefore, whether circumstantial evidence can be relied on in proving negligence by a party upon whom the burden of proof rests, in the face of the admitted fact that petitioner proved by direct and uncontradicted testimony facts which conclusively show that there was no such negligence. We agree with the statements of the State Supreme Court in its opinion (R. 132-133) that a fact may generally be established by circumstantial evidence, and that a well connected train of circumstances may be as cogent of the existence of a fact as is direct evidence, etc. The State Supreme Court's general statements here are apparently taken from the work it cites, 32 C. J. S. Section 1039, and particularly the first part of this section. However the State Supreme Court fails to refer to or quote parts of this section which state

the rule applicable under the facts in this case, so we will quote below the rule as set out on pp. 1101-1102 as follows:

> "The circumstances must, of course, agree with and support the hypothesis which they are adduced to prove; but circumstantial evidence is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion, or where the circumstances give equal support to inconsistent conclusions, *or are equally consistent with contradictory hypotheses. A fact cannot be established by circumstances which are perfectly consistent with direct, uncontradicted, and unimpeached testimony that the fact does not exist.*" (Italics ours).

It will be noted that circumstantial evidence is insufficient to establish a fact where the circumstances give equal support to inconsistent conclusions, or are equally consistent with contradictory hypothesis. Of course, the fact that the bunkers were empty of ice at final destination is equally consistent with the fact that the amount of refrigeration requested by the shipper was not sufficient to insure that there would be ice in the car at destination. The text further says that a fact cannot be established by circumstances which are consistent with direct, uncontradicted testimony that the fact does not exist. Petitioner has, as above pointed out and as the State Court admits, given uncontradicted testimony that the icing required by the shipper's instructions and under the tariff rules and the law was given, so that it was not negligent, and this, as just pointed out, is perfectly consistent, and certainly is not inconsistent, with the fact that there was no ice in the car at destination. Admittedly, the burden was on the respondent to prove that petitioner was guilty of negligence in furnishing the refrigeration, and under the rule above set out as to the sufficiency of proof by circumstantial evidence, the State Court erred in holding that respondent's proof of negligence by circumstantial evidence was sufficient to authorize a judgment against appellant. See the many federal and

state court cases cited under Note 25 to Sec. 1039 of C. J. S. *supra* on Pages 1101 and 1102, on which latter page is cited the case of *Pennsylvania RR. Co.* v. *Chamberlain*, 288 U. S. 333. This case is also directly in point. On Page 340-341 of the Chamberlain case this court says:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

The court states that this rule is derived from many of the decisions cited. On Page 339 (last par.), the court also said:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

Among the many other federal decisions which have adopted and applied this rule to similar facts, we may cite the case of *Texas Co.* v. *Hood*, 161 F. 2d 618-620 (5th C. C. A. 1947), in which it is said on Page 620:

> "*Where two equally justifiable inferences may be drawn from the facts proven, one for and the other against the Plaintiff, neither is proven, and the verdict must be against him who had the burden of proof.* Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819. Moreover where the Plaintiff's *right of recovery depends* upon the existence of a particular fact being inferred from proven facts, *such inference is not permissible in the face of the positive and otherwise uncontradicted testimony of unim-*

peached witnesses whose testimony is consistent with the facts actually proven, and which uncontradicted evidence shows affirmatively that the facts sought to be proved did not exist. Pennsylvania R. Co. v. Chamberlain, supra." (Italics ours).

See also a similar holding from the same court in *Mutual Life Insurance Co.* v. *Zimmerman*, 75 F. 2d 758.

From the foregoing, it is evident that the State Court erred in affirming a judgment against petitioner which was based on supposed circumstantial evidence which was equally consistent with the fact established by petitioner's undisputed evidence, given by unimpeached witnesses, that it had fully complied with its contract obligations. Of course, this is aside from and in addition to the conclusion reached under our first point that the fact that the car contained no ice at destination could not be considered as any evidence on the question of negligence.

In conclusion, petitioner wishes to briefly emphasize the importance of the decision and judgment herein to all carriers of carlot perishable shipments. The Appendix to this brief indicates the large number of such shipments, which are generally carried under refrigeration, transported in one year by this petitioner's road, and the carriers of the country transported many times this number. Courts not infrequently, when construing statutes of doubtful meaning, consider the effect of a given construction and the mischief or unfairness which might result from such a construction. We think the meaning of Tariff Rules No. 130 and 135 is entirely clear, but if it were otherwise, we may point out that the application given these rules by the State Supreme Court would permit practically every such case to be submitted to the jury on the issue of negligent refrigeration on similar testimony as produced herein, because all carload shipments are loaded by the shipper, and the bill of lading shows this one was "shipper's load and count", so that the carrier has no opportunity to ascertain the condition of the perishables when loaded. The duty of un-

loading carload freight also rests on the shipper or consignee (*Railroad Retirement Bd.* v. *Duquesne Warehouse Co.*, 326 U. S. 446, 453), so that ordinarily the delivering carrier does not examine the ice bunkers or lading at destination unless shipper's instructions happen to require icing there. Hence, under the decision of the State Court the issue of negligent refrigeration could be taken to the jury in every such case merely upon testimony of "no ice in bunkers" at destination, and the purpose of the reasonable and specific limitations of the Protective Tariff rules thus be circumvented.

Petitioner therefore urges that the writ prayed for herein should be granted and the decision of the State Supreme Court be reviewed by this court and its judgment be reversed with instructions to enter judgment for petitioner.

Respectfully submitted,

Charles Cook Howell,
V. E. Phelps,
Wilmington, N. C.

Hugh L. Willcox,
Florence, S. C.
Attorneys for Petitioner,
Atlantic Coast Line Railroad Company.

APPENDIX TO BRIEF.

Inasmuch as the sufficiency of the refrigeration furnished by the carrier under provisions of the interstate Perishable Protective Tariff rules could, under similar testimony, be made an issue of fact and submitted to the jury in any case under the holding of the South Carolina Supreme Court in this case, in order to show the importance of this decision to the carriers of perishable products, petitioner quotes below a certificate of the Interstate Commission dated July 16, 1948, which gives the number of carload shipments of certain kinds of perishables which are commonly refrigerated, which were carried on the petitioner's railroad for the calendar year 1947:

> "I, W. P. BARTEL, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of portions of sheets 1 and 2 in the Quarterly Report of Freight Commodity Statistics of the Atlantic Coast Line Railroad Company to the Interstate Commerce Commission for the calendar year 1947, the original of which is now on file in this Commission, in my custody as Secretary of said Commission.
>
> IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Commission this 16th day of July, A. D. 1948.
>
> W. P. BARTEL,
> *Secretary of the Interstate Commerce Commission.*
>
> (Seal of the Commission)

Commodity Group or Class No.		Number of carloads
59	Lemons, limes and citrus fruits, N.O.S.	309
61	Oranges and grapefruit	35,589
63	Peaches, fresh, not frozen	2,939
77	Cabbage	2,473
79	Celery	5,480
81	Lettuce	736
87	Tomatoes	1,208
89	Vegetables, fresh, N.O.S., not frozen	6,570
215	Meats, fresh, N.O.S.	6,926
217	Meats, cooked, cured, dried, and smoked	1,489
219	Packing house products, edible, N.O.S.	1,610
225	Poultry, dressed and frozen	180
227	Eggs	569
229	Butter	206"
	(Total	66,284 cars)